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Docket No. 97-1320

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

BRUCE W. DAVIS, *et al.*,

Petitioners,

v.

THE CITY OF HOLLYWOOD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S OBJECTION TO MOTION AND BRIEF ON BEHALF OF AMERICAN WORKERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S OBJECTION TO MOTION AND BRIEF ON BEHALF OF AMERICAN WORKERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to S.Ct.R. 37.5, respondent, City of Hollywood ("City"), hereby files its objections to the Motion and Brief on Behalf of American Workers in Support of Petition for Writ of Certiorari, filed by *amicus curiae*, Donald J. Jaret ("Motion"), and states as follows:[1]

LEGAL ARGUMENT

I. THE MOTION SHOULD BE DENIED BECAUSE IT RAISES NON-JURISDICTIONAL ISSUES NOT RAISED BY THE ACTUAL PARTIES.

The focus of the Motion is that the "window of correction" regulation embodied in 29 C.F.R. § 541.118(a)(6) should be held unconstitutional because it allegedly usurps the powers granted to federal courts under Article III, § 2 of the United States Constitution. The motion concedes that this argument was *never* presented or even addressed by either the petitioners or the City either at trial or on appeal before the United States Court of Appeals for the Eleventh Circuit. Motion, p.1.[2]

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[1] / While the certificate of service indicates that the Motion was filed with the Court on April 16, 1998, the City did not receive the Motion until April 20, 1998.

[2] / The Motion appears to misconstrue the import of S.Ct.R. 37.1 which encourages the filing of *amicus curiae* briefs that bring to the attention of the Court "*relevant* matter not already brought to its attention by the parties. . ." (emphasis supplied). As noted below, the Court has not construed this invitation as an open-ended request for *amici* to inject issues never previously raised by the parties to the proceeding. An *amicus curiae* brief that fails to meet the requirements of S.Ct.R. 37.1 is "disfavored."

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This Court has repeatedly held that a non-jurisdictional issue urged by an *amicus* will not be considered by Court if the issue has not also been raised by the parties before the Court. *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 97, n. 4 (1991); *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 60, n. 2 (1981); *see also Arizona v. Evans*, ___ U.S. ___, 115 S. Ct. 1185, 1204, n. 5 (1995) (when the record does not adequately present the issue for the Court's consideration, the Court should decline to address the question).

Since the City has not consented to the filing of an *amicus curiae* brief,[3] and the principal issue raised by the Motion is one not raised or even addressed by the parties, the Motion should be denied.

II. THE MOTION ATTEMPTS TO CIRCUMVENT ESTABLISHED AVENUES OF APPELLATE REDRESS BY ASKING THIS COURT, IN ESSENCE, TO RULE UPON THE APPLICATION OF LAW TO THE FACTS OF AN UNRELATED DISTRICT COURT PROCEEDING.

The Motion repeatedly makes reference to an adverse district court ruling in the case of *Eugene v. McDonald's*, Case No. 96-2324-CIV-Highsmith (S.D. Fla. 1997).[4] The Motion suggests that the court in *Eugene* entered final judgment in favor of the

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[3] / A motion for leave to file an *amicus curiae* brief submitted prior to the Court's consideration of a petition for writ of certiorari is not favored. S.Ct.R. 37.2(b).

[4] / A review of the district court's record in the *Eugene* case reveals that Mr. Jaret, who has submitted the Motion, was counsel of record for the plaintiffs in the *Eugene* case.

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plaintiffs, finding a violation of the FLSA, but permitted the defendant employer to exercise the window of correction post-judgment to avoid liability.[5] Neither this Court's application of the window of correction in *Auer v. Robbins*, 117 S.Ct. 905 (1997), nor the Eleventh Circuit's application of the window in *Davis v. City of Hollywood*, 120 F.3d 1178 (11th Cir. 1997), warrants the conclusion apparently reached in *Eugene* that the window may be applied after a final judgment of liability has been entered. The facts in *Auer* and *Davis* are utterly unlike those set forth at pages 7 through 10 of the Motion.

If the Motion seeks to have the district court's decision in *Eugene* reviewed for judicial error, then the appropriate appellate remedies should be pursued. An appeal should not be disguised as either a motion for leave to file an *amicus curiae* brief, or worse, a request for an advisory opinion from this Court as to litigation pending in the lower courts.

III. THE MOTION FAILS TO IDENTIFY A COGNIZABLE *AMICUS* INTEREST IN THE OUTCOME OF THESE PROCEEDINGS.

The motion purports, generically, to represent the interests of "American workers." The motion makes no distinction between exempt and non-exempt workers under the Fair Labor Standards Act ("FLSA"), the former of which have no

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[5] / The Motion's fundamental criticism of the window of correction is that it permits a party "against whom a 'judicial determination' has been made," to avoid liability by correcting past practices. *See* Motion, pp. 2, 4, 7-10.

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possible interest in the interpretation and application of the window of correction.

CONCLUSION

For all the foregoing reasons, the Motion should be denied.

I HEREBY CERTIFY that a true and correct copy of the forgoing was furnished by U.S. Mail this 29th day of April, 1998 to Donald J. Jaret, Esq., Law Officers of Donald J. Jaret, 4343 West Flagler St., Suite 350, Miami, FL 33134; Brenda J. Carter, Esq., Suite 300, 1451 West Cypress Creek Road, Fort Lauderdale, FL 33309; and Timothy J. McDermott, esq. 110 S.E. 6th St., 15th Floor, Fort Lauderdale, FL 33301.

Respectfully submitted,

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By _____
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April 29, 1998